

IN THE MISSOURI SUPREME COURT

CASE NO. SC83802

BRENT L. KINZENBAW

Respondent,

v.

DIRECTOR OF REVENUE
STATE OF MISSOURI,

Appellant

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Circuit Court of Morgan County, Missouri, the Honorable Patricia F. Scott, Judge. After the Missouri Court of Appeals, Western District, issued its opinion affirming the trial court's judgment, this Court ordered transfer pursuant to Rule 83.03. Therefore, this Court has jurisdiction of this appeal pursuant to Missouri Constitution Article V Section 10, as amended effective November 2, 1982.

STATEMENT OF FACTS

Brent L. Kinzenbaw was notified by the Director of Revenue on November 19, 1999 that his application for a Missouri Driver's License had been denied due to two "DWI" convictions in the State of Missouri and a DWI conviction in the State of Iowa (L.F. 13). He filed a Petition in the Circuit Court of Morgan County seeking review of this denial on December 20, 1999 (LF 1-2). The Director filed an Answer with certified records attached to it on January 13, 2000 (LF 8-20).

The cause was called on January 28, 2000 and the Prosecuting Attorney of Morgan County appeared on behalf of the Director pursuant to Section 302.311. R.S.Mo. 1994 (LF 7, 21; Tr. 2). The Prosecuting Attorney indicated that he would present no evidence (Tr. 2). Petitioner's attorney presented no evidence and moved for a judgment in his favor based on lack of evidence presented by the Director, as the Director of Revenue had the burden of proof. The trial court found that the Director had failed to meet its burden of going forward with the evidence (Tr. 3). The trial court subsequently entered judgment setting aside the denial of Petitioner's application for a driver's license (LF 22, 23). This appeal by the Director ensued.

POINT RELIED ON

The Court below did not err in setting aside the license denial, because the Director did not meet its burden of going forward with the evidence in that the mere filing of the relevant records with the court, by itself, and without subsequently moving to have and having said records admitted into evidence at a later hearing, does not constitute carrying the burden of production of evidence.

Authorities Cited:

Wampler v. Deputy Director, 48 S.W.3d 32 (Mo. 2001)

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. Banc 1976)

Lane v. Director of Revenue, 996 S.W.2d 117 (Mo.App.E.D. 1999)

McDonald v. Director of Revenue, 985 S.W.2d 375 (Mo.App.S.D. 1999)

R.S.Mo. Section 302.311 (2000)

ARGUMENT

The court below did not err in setting aside the license denial, because the Director did not meet its burden of going forward with the evidence, in that the mere filing of the relevant records with the court, by itself, and without subsequently moving to have and having said records admitted into evidence at a later hearing, does not constitute carrying the burden of production of evidence.

Standard of Review

In reviewing this court-tried case, this Court is to sustain the judgment of the court below unless there is no substantial evidence to support it. It is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30.32 (Mo. Banc 1976).

A. *Wampler v. Director of Revenue* is dispositive. The Director must introduce evidence at the hearing or fail to carry its burden.

This Court's recent decision in *Wampler v. Director of Revenue*, 48 S.W.3d 32 (Mo. 2001) is directly dispositive of the sole point presented by the Director in this appeal. In *Wampler*, this Court refused to follow *Lane v. Director of Revenue*, 996 S.W.2d 117 (Mo.App. 1999) insofar as *Lane* found that records attached to pleadings by the Director are sufficient to carry the burden of production of evidence even though the same are never introduced into evidence. *Wampler*, supra, at 35. Instead of following *Lane*, this Court held

that because the Director presented no evidence, in that it failed to introduce any of the records into evidence at trial, the trial judge's judgment would not be overturned on appeal. *Id.*

Similarly, in this case, as in *Wampler*, the Director filed certified copies of its administrative records, including Respondent's Missouri Driver Record and other court records relating to Respondent's alleged three DWI-related convictions, by attaching them to its Answer. *Id.* at 33. (L.F. 8-20). Further, in this case, as in *Wampler*, the Prosecuting Attorney appeared at the hearing for the Director pursuant to Section 302.311 R.S.Mo. (1994). *Id.* (L.F. 7, 21; Tr. 2). Moreover, in this case, as in *Wampler*, the Prosecuting Attorney presented no evidence on behalf of the Director. *Id.* (Tr. 2). Finally, in this case, as in *Wampler*, the Petitioner's attorney asked to have the court enter, and the trial court ultimately did enter, an order setting aside the Director's actions, because the Director had failed to go forward with its burden of production of evidence, at the trial de novo. *Id.* at 34. (L.F. 22, 23; Tr 2-3). Therefore, because the facts of this case are virtually identical to those in *Wampler*, this Court should apply the same reasoning and judgment handed down in *Wampler*, and affirm the trial court's judgment and order.

B. Appellant's authorities are not followed by this Court.

In her appellate brief, before the Western District, in addition to *Lane*, the Director relies on *McDonald v. Director of Revenue*, 985 S.W.2d 375

(Mo.App.S.D. 1999) for the proposition that "[I]t is clear that these records need only be filed with the reviewing court under Section 302.311, R.S.Mo. 1994; they do not have to be formally admitted into evidence." Appellant's Brief in Western District, page 3, paragraph 3. While that proposition may have been clear in the Eastern District as a result of the holding in *Lane*, and to some lesser extent in the Southern District as a result of the holding in *McDonald*, the Western District had not decided the issue at the time the Director filed its brief. Since that time, this Court has issued its ruling in *Wampler* and its holding is contrary to that in *McDonald* and *Lane*. As discussed, *Wampler* holds that merely attaching certified records to the Director's Answer is insufficient to carry the burden of proof in a hearing on the denial of licensure pursuant to Section 302.311 R.S.Mo. (1994). *Wampler, supra, at 35*.

In addition, the Director's authority can be distinguished in a material way from this case. In *McDonald*, the Southern District held that the trial judge could consider a certified copy of an underlying ticket as part of the basis for its judgment in a license denial case. *McDonald, supra* at 377. The difference is that, in *McDonald*, a substantial part of the administrative record was stipulated to by the parties and, as a result, admitted into evidence. *Id.* at 376. In the present case, however, there were no stipulations whatsoever. The difference in the two cases is material because even if it could be said that the trial judge could rely on an attached record *as part of* its basis for judgment under Section

302.311 R.S.Mo., that result is inapplicable here because the trial court's decision could not have been based *only partly* on the attached records because no evidence was introduced or stipulated to by the parties. Therefore, the Director's authority in *McDonald* is factually dissimilar to this case. Consequently, this Court should follow its holding in *Wampler* and affirm the trial court's judgment and order.

C. Trial de novo means the Director of Revenue must justify her decision at the hearing.

When looked at in its plain meaning, R.S.Mo. Section 302.311 (2000), requires that the Director of Revenue present to the trial court evidence of her decision to take away Mr. Kinzenbaw's privilege to drive. "Upon such appeal the cause shall be heard de novo...." This phrase puts the matter before the trial judge "anew". *Wampler*, at 35. As such, simply filing with the court a record of what the agent looked at is not proper because of the fundamental difference between the agent working for the Director of Revenue and the impartial trial judge hearing the matter "de novo".

The agent of the Director of Revenue is the paid and trained employee of the Director of Revenue. This person presumably does not need "direction" in his or her review of a matter. There is no evidence presented to this individual, it is rather this individual's job to procure and review such information as this

individual deems fit to make the Director's decision to grant or deny driving privileges.

The trial judge, by contrast, is an impartial hearer of the facts before the court, not an employee of the Director of Revenue. The matter before the court is there on a "de novo" basis. *Id.* In other words, the matter is before the judge at the same level as it was before the original agent of the Director of Revenue. However, the trial judge is not the paid employee of the Director of Revenue. At the "de novo" hearing, it is not a decision against Mr. Kinzenbaw which Mr. Kinzenbaw needs to fight, but rather the Director of Revenue's decision which must be justified to the trial court as the slate is clean. This is why the burden is placed upon the Director of Revenue. *Id.*

To place upon the trial court the directive that in de novo proceedings the court must review the record of the Director of Revenue's decision filed with the court and consider it without anyone introducing same into evidence during the trial de novo hearing turns the trial judge into another Director of Revenue agent. The statute is clear in its intent on this matter. *R.S.Mo. Section 302.311*. An attorney is provided for the Director of Revenue. An evidentiary hearing is contemplated before the trial court. The burden is upon the Director of Revenue because of the "de novo" status of the hearing to justify her decision to the trial court. *Wampler, supra*. As in every instance of an evidentiary hearing, the attorney or party for either side may present evidence

or not. In the instant case, no evidence was presented for the trial court to review. Without such evidence before it, the trial court's only option in a de novo proceeding was to overturn the Director of Revenue's decision. *Id.*

CONCLUSION

The Court below did not err in setting aside the license denial, because the Director did not meet its burden of going forward with the evidence, in that the mere filing of the relevant records by attaching them to its Answer, by itself, and without subsequently moving to have and having the records admitted into evidence at a later hearing, does not constitute carrying the burden of production of evidence. On the contrary, the Director is required to have the records formally admitted into evidence in order to carry its burden of proof. As a result, the authority relied upon by the Director has been overturned by this court's decision in *Wampler v. Director of Revenue*. Moreover, the facts in *Wampler* were virtually identical to those present in this case. Therefore, the reasoning applied in *Wampler* applies in this case.

Finally, even if it could be said, albeit in direct opposition to this Court's previous holding in *Wampler*, that the trial court can rely *in part* on certified records that are not formally admitted into evidence, that escape would not be applicable to the Director in this case because there was no evidence formally admitted or stipulated in the trial court.

Therefore, for all of the foregoing reasons, this Court should affirm the trial court's judgment and order in this case.

WHEREFORE, Respondent Brent L. Kinzenbaw prays this Court to affirm the Judgment and Order of the Circuit Court of Morgan County; and for his costs on appeal; and for such other relief this Court deems just and proper.

RESPECTFULLY SUBMITTED,
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**CERTIFICATE OF SERVICE AND
COMPLIANCE WITH RULE 84.06(B) AND (C)**

The undersigned hereby certifies that a true copy of the foregoing instrument with one disk containing the foregoing brief was mailed, U.S. Mail, postage prepaid to

James R. Layton
State Solicitor
P.O. Box 899
Jefferson City, MO 65102

on this ____ day of October, ____ . The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b).

TIMOTHY R. CISAR

